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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Policies and Rules
Pertaining to the
Regulation of
Cellular Carriers

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RM No. 8179 /

To: Chief, Tariff Division

COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Tariff Division

- Declare that, subject to a single proviso, cellular carriers are non-dominant;
- Declare that cellular service is a type of telephone exchange service eligible, where appropriate, for treatment under 221(b) of the Communications Act of 1934 (the "Act"), as amended;^{1/} and
- Amend Part 61 of the Commission's Rules to streamline the tariff filing requirements of cellular carriers.

2/ Comcast controls, through intervening subsidiary corporations, Frequency Block A cellular systems in the following markets: Philadelphia, PA MSA, Wilmington, DE MSA, Long Branch, NJ MSA, New (continued...)

interstate configuration of several of its constituent cellular systems, Comcast has a direct interest in the subject matter of the CTIA Petition.

The sudden imposition of a federal tariffing requirement on a highly competitive cellular industry,^{3/} after a decade of regulatory forbearance by the Commission, puts the industry and the Commission in a quandary. The Commission has heretofore generally viewed cellular carriers as providers of local exchange telecommunications services, rather than as interstate carriers subject to Title II of the Act.^{4/} Further, the Commission has traditionally accorded cellular carriers non-dominant treatment in all material respects, but has not formally classified cellular service as non-dominant. By surprise and without any obvious benefit to the public, cellular carriers have been caught in the backwash of AT&T v. FCC, forcing an examination of the degree to

^{2/}(...continued)

Brunswick, NJ MSA, Trenton, NJ MSA, New Jersey 1-Hunterdon RSA, Joliet, IL MSA, and Aurora/Elgin, IL MSA.

Comcast, through a subsidiary, is in negative control of Delaware RSA 1 Limited Partnership, the Frequency Block A licensee in the Delaware 1-Kent RSA and of C-SW Cellular Partnership, the holder of interim operating authority on Frequency Block A in the Maryland 2-Kent RSA.

^{3/} AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993, vacating Fourth Report and Order in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252), 95 F.C.C.2d 554 (1983).

^{4/} See e.g. The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 RR 2d 1275, 1278 (1986).

which cellular services should be subject to a federal tariffing requirement. The declaratory ruling sought by CTIA will limit the unnecessary burden associated with tariffing cellular service by requesting a formal Commission statement that cellular is non-dominant. Further, the CTIA Petition serves as a vehicle for a declaration that any tariff requirement imposed on cellular carriers will be limited to interstate interexchange services and subject to "streamlined" tariffing rules.

II- The Commission Should, Subject To A Proviso, Declare That Cellular Is A Non-Dominant Carrier Service

Comcast, subject to a single caveat, concurs in CTIA's request for a declaration that cellular carriers are non-dominant. This declaration, with the proviso requested by Comcast, will have the salutary effect of relieving cellular carriers of the unnecessary and counterproductive duty to file cost support for their rates and will accord cellular rate filings a presumption of lawfulness. The competitive nature of the cellular industry, as well as the increased level of competition in wireless services represented by Fleet Call, Inc. and other ESMR operators and PCS operators, is apparent and fully supports a conclusion that cellular is a non-dominant carrier service.

However, Comcast's support of the requested declaration of cellular non-dominant carrier status is subject to the proviso that the structural separation requirements of Sections 22.901(c) and

(d) of the Commission's Rules remain in effect.^{5/} Should the Commission relieve the Bell Operating Companies ("BOCs") of the existing cellular structural separation requirement, the resulting ability of the BOC cellular interests to disadvantage their competitors, through, at a minimum, interconnection and cross-subsidization abuses, will drastically and adversely affect the state of competition in the cellular industry. If unleashed from the cellular structural separation requirements, the BOCs will be in a position to leverage their monopoly stranglehold on underlying telephone local exchange operations into true market power dominance in affected cellular markets. See Comcast Comments, supra, note 5. Thus, a finding of cellular non-dominance should be subject to the continued effectiveness of Section 22.901(c) and (d) of the Commission's Rules or, in the event that the structural separation requirements are eliminated, the Commission should impose more stringent tariffing requirements and other regulations, such as joint cost allocation and accounting rules, upon BOC cellular operations in order to maintain the existence of a

^{5/} The Bell Atlantic Telephone Companies, Bell Atlantic Mobile Systems, Inc., NYNEX Corporation, and Southwestern Bell Corporation recently filed their joint Petition for Investigation and For Order to Show Cause, FCC File No. MSD 93-13 (the "Petition For Investigation"), in connection with the proposed transaction whereby AT&T will acquire a stock interest in McCaw Cellular Communications, Inc. Included in the Petition is a proposal to repeal the cellular structural separation requirements. Bell Atlantic Mobile Systems, Inc. is the Frequency Block B competitor in four of the six Comcast mid-Atlantic cellular markets, while the cellular affiliate of NYNEX is the competitor in the other two markets. Bell Atlantic telephone companies are the local exchange telephone companies in Comcast's mid-Atlantic markets. See Comments of Comcast Cellular Communications, Inc. filed in response to the Petition for Investigation ("Comcast Comments").

competitive cellular industry.

III- The Commission Should Declare Cellular Service To Be A
"Telephone Exchange Service" Under Section 221(b) Of The
Act, Where Appropriate

The very geographic structure of cellular markets established by the Commission -- Standard Metropolitan Statistical Areas (or combinations thereof) in the case of the cellular MSAs and state and county lines in the case of cellular RSAs -- in obvious recognition of likely calling patterns, has led to cellular system designs and operating patterns manifesting all technical characteristics of "local exchange" telecommunications services. Accordingly, the Commission should classify such services as being "telephone exchange services" exempt from Title II jurisdiction ~~under Section 221(b) of the Act where the cellular exchange area~~

Cir. 1976), cert denied, 434 US 1977 ("North Carolina II").

The following indicia of "telephone exchange service" typify most cellular systems:^{7/}

- (1) provision of dial tone and telephone numbers to a universe of subscribers;
- (2) provision of call switching and routing services;
- (3) ~~provision that permits a community of residential and~~

in obvious recognition of likely calling patterns associated with mobile services, it overlaps one or more traditional telephone carrier exchange areas. That cellular and traditional telephone exchange areas may overlap is neither logically nor legally inconsistent with the classification of cellular as "telephone exchange service."

Cellular carriers may also provide services that are not telephone exchange services, e.g., "wide-area" coverage to multiple CGSAs and other "interexchange" services. In this regard, cellular carriers are similar to local exchange telephone carriers, most of which provide interexchange services in addition to telephone exchange services. Accordingly, the fact that cellular carriers provide services in addition to exchange services should not serve to jeopardize the basic classification of such carriers as providers of telephone exchange services.

In light of the social and economic considerations which went into the Commission's structure of geographic cellular markets, it should be presumed that, at a minimum, cellular intraCGSA services qualify as "telephone exchange services." As suggested by the CTIA Petition (at 9), a case-by-case analysis may be necessary to determine if certain other cellular services, such as multi-CGSA "super system" services, are equivalent to telephone exchange service.

B- Section 221(b) Of The Act Should Apply To Cellular Service, Where Appropriate

The purpose of Section 221(b) of the Act is to enable state commissions to regulate telephone services in multi-state exchange

areas, such as Washington, D.C., New York City, and Kansas City. North Carolina II, supra.^{8/} Where a cellular carrier's exchange area lies in two or more states, services within that exchange area, if "subject to regulation" by a state, should be deemed exempt from a federal tariffing requirement under Section 203 of the Act. Implicit in Section 221(b) is Congressional recognition that exchange area calling scopes can span state boundaries, a conclusion which is also implicit in the Commission's creation of cellular geographic markets which, at least in the case of the MSAs, are not necessarily confined within state boundaries.

Comcast fully agrees with and endorses CTIA's conclusion, stated at page 7 of its Petition, that:

Section 221(b), which refers to services 'subject to' regulation by the states, would apply in those states where the state commission is empowered to regulate cellular and has simply declined (affirmatively or otherwise) to exercise its jurisdiction.

Every state has the requisite jurisdictional power to regulate cellular and, thus, cellular is inherently subject to state

^{8/} Section 221(b) states that:

Subject to the provisions of Section 301 [of the Act], nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for on in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State Commission or by local governmental authority.

regulation. That certain states have chosen to forbear from such regulation or have chosen not to exercise jurisdiction at all, by statutory preclusion or non-extension of jurisdiction, is an exercise of jurisdictional power. The existence of state jurisdictional power over multi-state cellular exchange service, regardless of whether such jurisdictional power is asserted, should, in and of itself, be deemed conclusive proof that the "subject to" state jurisdiction requirement of Section 221(b) has been satisfied.

The foregoing construction of Section 221(b), upon adoption by the FCC, will serve to subject one less facet of cellular services -- those within cellular local exchanges which happen to overlap two or more state boundaries -- from a burdensome and unnecessary federal tariffing requirement. Such services are logically no more a federal concern than are any other exchange-type services.

IV- The Commission Should Amend Part 61 Of Its Rules To Streamline Tariff Filing Procedures For Cellular Carriers

Finally, Comcast fully supports CTIA's request for streamlining tariff filing requirements and procedures for cellular carriers, and notes that the Commission has solicited comments on proposed amendments to the Part 61 Rules in Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 93-36 (February 19, 1993) (the "Tariff NPRM"). Comcast believes that the Tariff NPRM subsumes CTIA's proposals for changes in the tariff filing requirements and procedures for cellular carriers, assuming arguendo that the Commission declares cellular carriers to be non-dominant. If the

regulation. That certain states have chosen to forbear from such regulation or have chosen not to exercise jurisdiction at all, by statutory preclusion or non-extension of jurisdiction, is an exercise of jurisdictional power. The existence of state jurisdictional power over multi-state cellular exchange service, regardless of whether such jurisdictional power is asserted, should, in and of itself, be deemed conclusive proof that the "subject to" state jurisdiction requirement of Section 221(b) has been satisfied.

The foregoing construction of Section 221(b), upon adoption by the FCC, will serve to subject one less facet of cellular services -- those within cellular local exchanges which happen to overlap two or more state boundaries -- from a burdensome and unnecessary federal tariffing requirement. Such services are logically no more a federal concern than are any other exchange-type services.

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cellular carriers to be non-dominant at this time, Comcast urges the Commission to adopt the CTIA Petition proposal (at 20-26) to amend its Part 61 Rules to nonetheless treat cellular tariff filings under the same rules that apply to nondominant carriers.

Conclusion

Comcast fully supports the CTIA Petition and urges adoption of the proposals contained therein. In particular, the Commission should move quickly to memorialize the longstanding de facto treatment of cellular as nondominant by issuing the declaratory ruling requested by CTIA. Further, the Commission should declare

CERTIFICATE OF SERVICE

I, Richard M. Tettelbaum, an attorney in the law offices of Gurman, Kurtis, Blask and Freedman, Chartered, do hereby certify that I have on this 19th day of March, 1993, had copies of the foregoing "COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC." mailed by U.S. first class mail, postage prepaid, to the following:

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